United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1257

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8/26/75

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Plaintiff-Appellee

Docket No. 75-1257

-against-

JORGE DABED-SUMAR

Defendant-Appellant

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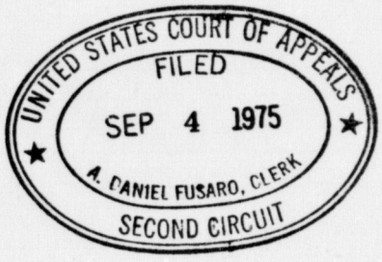
BRIEF ON BEHALF OF DEFENDANT-APPELLANT



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PRELIMINARY STATEMENT UNDER
SECOND CIRCUIT RULE 28

The decision herein was rendered after a jury trial before United States District Court Judge LEE P. GAGLIARDI, in the United States District Court for the Southern District of New York, which found the defendant appellant guilty as charged in the indictment and the judgment of conviction was entered on June 26th, 1975.

Prior to the commencement of trial, the defendant made an oral motion to dismiss the indictment on the ground that he was deprived of his Constitutional rights by being kidnapped and being brought into this jurisdiction without his consent. In support of his motion the defendant made an offer of proof and a hearing was held in open court, after which hearing his motion was denied by JUDGE LEE P. GAGLIARDI.

STATEMENT OF THE ISSUE

The sole issue in this case is whether the defendant-appellant's Constitutional rights were violated by the manner in which he was brought from Chile into the jurisdiction of the United States District Court for the Southern District of New York.

STATEMENT OF THE CASE

The defendant-appellant was indicted on Indictment No. 74 CR 977 which charged the appellant, along with certain others, entered into a conspiracy to distribute narcotics in violation of 21 USC Sections 173, 174, 812, 841, 952 and 960. There was a second count to the indictment which charged the defendant with the importation of 8 kilograms of cocaine into the United States in violation of 21 USC Sections 952, 960 and 18 USC Section 2. The appellant was tried separately in the United States District Court for the Southern District of New York before

HON. LEE P. GAGLIARDI, United States District Judge, and a jury. The appellant was found guilty as charged and on June 26th, 1975 was sentenced to 4-1/2 years in prison together with a special parole period.

Prior to trial, the appellant moved orally, charging that he was deprived of his rights under due process of law, and that he had been kidnapped into the United States by American agents. The appellant made an offer of proof and a hearing was held by JUDGE GAGLIARDI on November 18, 1974. At the hearing the appellant testified in his own behalf and stated that he was the owner of a clothing factory in Santiago, Chile, in which he manufactured ready to wear clothing. He stated that on or about October 16, 1973, an American agent named JORGE FRANGULIS, came to his factory and asked the appellant if he was able to get him drugs. On the appellant's denial that he was involved in that business, he stated that FRANGULIS left and returned within two minutes with another American agent whose name he did not know, and thirty-one other persons from the Customs Police in Chile. The appellant was kicked and beaten in the presence of MR. FRANGULIS and was then arrested by the Chilean police. A search was conducted of his factory by the Chilean police also in the presence of MR. FRANGULIS. (H.7-10). He was then taken to the 6th Precinct in Santiago, where he was stripped, handcuffed to a chair with a black hood over his head. He was then beaten and electric currents were placed on his genital organs. In addition, three fingernails were cut into the flesh. While he was being beaten he heard persons speak in English but he did not know who they were. At 8:30 in the morning of October 17, 1973, the following day, he was taken to a building of the Chilean police and he saw a department where Americans were working. He was held in prison from October 17, 1973 through

December 22, 1973, on a charge that the Chilean police had found a bag containing some white powder at or near his factory. He stated that he was acquitted of this charge in Santiago on December 22, 1973 because the bag did not contain drugs.

He was again arrested by Chilean police on December 31, 1973 and again taken to the 6th Precinct, where he was stripped, blindfolded and again tortured. He did not see Americans on that date. He was released by the Chilean police on the following day. (H.16-18).

On February 15, 1974, he was again arrested and taken to the 6th Precinct in Santiago, where he was again tortured and beaten. He described the torture room and the cells of the 6th Precinct and said when he was removed from the torture room to a cell he saw a man who was called by the name of CECIL by the Chilean police and he heard this man speak in English and in broken Spanish. He identified him as the CHARLES W. CECIL, JR., who was one of the American agents in Chile. On February 17, 1974 he was released from the 6th Precinct and returned to his home.

He was again arrested in the early part of April, 1974 at his home, brought to a Santiago police station and was taken from there to the Chilean Stadium. He stated that the admission chief of the stadium refused to take him in and a Chilean police lieutenant named GUITERREZ showed the admissions chief a paper which stated that he was arrested under the orders of Bureau of Narcotics of the United States and that it was possible he would be sent to the United States. (H. 26). He remained at the stadium from April 16th, to April 22nd, and was taken to Valparaiso where he was questioned by the Naval Prosecutor and held until May 3, 1974. He was then told by the Chilean Naval Prosecutor in Valparaiso, that he was free to go. He and a

group of others were taken out of the jail at Valparaiso, handcuffed and brought to the 13th Police station in Santiago. He was removed from there on May 4th, and brought to the international airport in Puduhuel, Chile, where a physician gave him three pills and told him they were to make him sleep. Present at Puduhuel airport was CHARLES WILLIS CECIL, JR., an American agent. He was taken to an airplane where he saw the two American agents, CECIL and FRANGULIS. FRANGULIS went only as far as Lima, Peru, in the plane. DR. CIFUNI, the physician who gave him the pills, travelled on the plane with him.

The government presented no witnesses at the hearing. Assistant United States Attorney BANCROFT LITTLEFIELD, JR., stated to the Court that the indictment of the appellent went back to December 4, 1973 and that the Washington office of the Drug Enforcement Administration, advised the Santiago office of the D.E.A. of the existence of these indictments. Subsequently, the D.E.A. in Santiago communicated the existence of warrants which were based on these indictments to the Chilean government and requested that the appellant and others be expelled and inquired of them whether it was possible that they be expelled. Thereafter, the appellant and others were expelled from Chile and brought to the United States on plane space reserved by members of the American embassy. (H.49-50).

Following the conclusion of the hearing the Court denied the appellant's motion. The first trial proceeded and resulted in a verdict of guilty by the jury which was later vacated by JUDGE GAGLIARDI on grounds which have nothing to do with this appeal and the appellant then proceeded to trial again on the same

indictment and was convicted and sentenced as set forth herein.

POINT I

THE FEDERAL COURTS HAVE NO JURISDICTION OVER DABED-SUMAR SINCE HE WAS BROUGHT INTO THE UNITED STATES BY FEDERAL AGENTS IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE CONSTITUTION

We are bound by the rule that a court's power to bring a person to trial upon criminal charges is not impaired by the abduction of the defendant into the jurisdiction. KER v. ILLINOIS 119 U.S. 436 (1888); FRISBIE v. COLLINS, 342 U.S. 519 (1952). But in UNITED STATES v. TOSCANNINO, 500 F.2d 267 (1974), this Circuit held that "Ker-Frisbie doctrine" is subject to another overriding principle as set forth in UNITED STATES v. LIRA ____ F2d ____ (2nd Cir. decided April 14, 1975), as follows:

> 'However, in UNITED STATES v. TOSCANNINO, supra, we held that this general rule, sometimes referred to as the "Ker-Frisbie doctrine" is subject to the overriding principle that where the Government itself secures the the defendant's presence in the jurisdiction through use of cruel and inhuman conduct amounting to a patent violation of due process principles, it may not take advantage of its own denial of the defendant's constitutional rights. We there stated that a district court must "divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unreasonable, and unnecessary invasion of the accused's constitutional rights." 500 F.2d at 275.

Essentially, the holding in TOSCANNINO, with its allegations of torture of the appellant in that case, stated that where torture and inhuman treatment is brought about by the Government, then the constitutional rights of a defendant have been violated.

In UNITED STATES ex rel LUJAN v. GENGLER, 510 F.2d 62 (2d Cir.) 1975, the holding in this Court was that where the defendant is forcibly brought into the jurisdiction without torture or inhuman conduct, that the Ker-Frisbie doctrine will apply. In the LUJAN case, the defendant was tricked into entering a jurisdiction friendly to the American agents from which he could be forcibly seized and brought to the United States. There was no allegation of torture or inhuman conduct to which LUJAN was subjected.

In UNITED STATES v. LIRA, supra, the appellant suggested that the Government was "vicarioulsy responsible" for his torture since the government put the forces of Chilean law into motion by requesting the defendant's arrest and expulsion. In the LIRA case there was no proof of American involvement other than the fact that the defendant testified that he heard English spoken during the time of his torture in Santiago, and that he saw D.E.A. agents at the Naval Prosecutor's office in Valparaiso where he was proceessed and that he was told that his photograph was for the "Americans". In this case the Court held that there was no evidence that there were American agents present at or privy to his interrogation under torture or that the persons he overheard speak English were Americans. In that case the Court held that the government has no control over foreign police and refused to extend TOSCANNINO to cover the facts set forth in LIRA.

In the instant case, however, we have stronger facts regarding the involvement of American agents than we had in the case of LIRA. Here DABED-SUMAR testified that his troubles were set in motion by a visit of an American agent whom he called, JORGE FRANGULIS, to his place of business on October 16, 1973. He testified FRANGULIS endeavored to entrap the defendant into offering him drugs

for sale. When he refused the request of FRANGULIS and told him to leave his factory, he testified that FRANGULIS returned with Chilean police and was present when the Chilean police searched the factory for drugs and then took DABED-SUMAR to a Chilean police station. Admittedly DABED-SUMAR was blindfolded with a black hood and he could only tell the same facts that LIRA stated, in that he heard persons speaking in English. However, he was taken from the 6th Precinct to a building where he stated he saw a department where all Americans were working. He did not see any other Americans until he was again under arrest on February 16th, where when he was in a cell he saw D.E.A. agent CHARLES W. CECIL, JR., whom he later met when he was taken to the United States. When he was taken from the Naval Prosecutor's office in Valparaiso, Chile, to Santiago, he saw CECIL again in a police vehicle. Then he was taken to Puduhuel airport in Santiago where he was turned over to the Americans on Chilean soil and flown to the United States. In UNITED STATES v. LIRA, supra, LIRA did not have the contacts with American agents that DABED-SUMAR had. The troubles of DABED-SUMAR started with the visit of FRANGULIS, whom the government will concede is an American agent and at that time chief of the D.E.A. office in Santiago and whose correct name is GEORGE FRANGULIE. When DABED-SUMAR refused to have traffic with the American agent in the matter of drugs, the American agent left and returned within a few minutes with Chilean police who conducted the search of the factory in the presence of the American agent. Certainly, we do have evidence here of American participation in the actions of the Chilean police. Admittedly DABED-SUMAR'S first contact with CECIL was merely CECIL'S walking past a cell where DABED-SUMAR was held,

but does not this show that CECIL had free access to the Chilean police station. Again, we have the same set of facts as in LIRA when this appellant was brought to Puduhuel airport, examined by a physician who gave him some pills and placed on a plane on which were CECIL, FRANGULIS, and Chilean police. FRANGULIS left the plane at Lima, Peru, and CECIL and the Chilean policemen made the flight to New York.

In the concurring opinion by JUDGE OAKES in UNITED STATES v. LIRA, supra, Judge Oakes stated the following:

> Having sat on both UNITED STATES v. TOSCANNINO, 500 F.2d 267 (2d Cir. 1974) and UNITED STATES ex rel LUJAN v. GENGLER, 510 F.2d 62 (2d Cir. 1975) and now on this case, I agree that this case falls--just barely--on the LUJAN rather than the TOSCANNINO side of the line.

If the LIRA case falls "just barely" on the LUJAN rather than the TOSCANNINO line, may it not be said that the additional facts here of the visit by FRANGULIS to the DABED-SUMAR factory on October 16, 1973 in an endeavor to entrap the appellant into selling drugs to him, immediately followed by a police raid at which FRANGULIS was present, push the instant case over to the TOSCANNINO side of the line. Surely, the conduct of FRANGULIS in bringing about the raid on the DABED-SUMAR factory is strictly to be condemned. It is interesting to note that this testimony as to the conduct of FRANGULIS was in no way controverted by the government at the hearing. The activity of the D.E.A. at that point could certainly fall into the category of questionable methods and within the condemnation of MR. JUSTICE FRANKFURTER'S dissent in HARRIS v. UNITED STATES 331 U.S. 141 172 (1947)

> Stooping to questionable methods neither enhances that respect for law which is the most potent element in law

> enforcement, nor, in the long run, do such methods promote successful prosecution. In this country police testimony is often rejected by juries precisely because of a widely entertained belief that illegal methods are used to secure testimony. Thus, dubious police methods defeat the very ends of justice by which such methods are justified. No such cloud rests on police testimony in England. Respect for law by law officers promotes respect generally, just as lawlessness by law officers set a contagious and competitive example to others. See IV Reports of the National Commission on Law Enforcement and Observance ("Lawlessness in Law Enforcement") passim, especially pp. 190-192. Moreover, by compelling police officers to abstain from improper methods for securing evidence, pressure is exerted upon them to bring the resources of intelligence and imagination into play in the detection and prosecution of crime.

Merely because American agents are in a country which apparently allow them great latitude in the performance of their duty, does not justify the action of FRANGULIS in the instant case. Frankly, this case is one which should follow the concurring opinion of JUDGE OAKES in UNITED STATES v. LIRA, supra:

> Finally it should be said that, regardless of the abstract doctrine Ker and Frisbie are said to stand for, we can reach a time when in the interest "of establishing and maintaining civilized standards of procedure and evidence," we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power under McNABB v. UNITED STATES, 318 U.S. 332, 340 (1942), and MALLORY v. UNITED STATES 354, U.S. 449 (1957). As we pointed out in TOSCANNINO, supra, that "supervisory power is not limited to the admission or expulsion of evidence, but may be exercised in any manner necessary to remedy abuses of a district court's process." 500 F.2d 276. To my mind the Government in the laudable interest of stopping international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interests of the greater good of preserving respect for law.

Certainly the facts in the instant case require a finding that this appellant was denied

due process.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED
AND THE DEFENDANT RELEASED FROM
CUSTODY ON THE GROUND THAT HE HAS BEEN
DENIED HIS CONSTITUTIONAL RIGHT
TO DUE PROCESS

Respectfully submitted,

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